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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948.

No. 199

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
a corporation,
petitioner,

vs.

BETTY MATSUMOTO,
respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States

May It Please the Court:

Your petitioner, Chicago and North Western Railway Company, a corporation, by its counsel respectfully shows this Honorable Court:

I.

Summary statement of matter involved.

This action, brought by respondent in the circuit court of Cook County, Illinois, to recover damages for personal injuries sustained while a passenger on a passenger train (R. 2-4) operated by petitioner, was removed to the district court of the United States, northern district of Illinois, eastern division, on diversity of citizenship. The trial of the case to the court and a jury resulted in a verdict in favor of respondent for $5,000 (R. 143) which was reduced by accepted remittitur and judgment was entered against petitioner for $4,250. (R. 147)

On appeal the United States Circuit Court of Appeals for the Seventh Circuit, by a divided court, affirmed the judgment. The majority opinion (R. 154) was written by Circuit Judge Kerner of Illinois and concurred in by Circuit Judge Minton of Indiana. District Judge Duffy of Wisconsin, the third member of the court, declined to concur in the majority opinion and filed a dissenting opinion. (R. 160)

This petition seeks a writ of certiorari to review the judgment of the circuit court of appeals.

The train in question was powered by two diesel units and carried 12 cars (R. 50). Respondent was riding in coach 3411 (R. 43), the fourth coach from the head of the train. (R. 41)

Respondent testified that as she was standing facing the open door of the powder room, of the coach, with her back against the coach window (R. 10), there occurred a jolt which slammed her against the wall of the room and rendered her unconscious. She did not know the cause of the jolt (R. 11). The powder room was

at the head end and at the left-hand side of the coach. (R. 43)

Uncontradicted evidence introduced by petitioner established that the train was struck by an automobile which ran into the side of the first coach back of the engine (R. 71) at a highway crossing at grade, approximately two miles north of Eden, Wisconsin. (R. 43) Uncontradicted evidence further established that the collision between the automobile and the train resulted without negligence on the part of petitioner and no issue on that point was made. (R. 96-97)

The force of the collision was such that the automobile became imbedded between the moving train and the embankment along the right of way, (R. 60-61, 72) and in this position the automobile scraped and bumped against several of the coaches, including coach 3411. (R. 71) scratching the side door at the left and front end and breaking two of the windows of that coach. (R. 133-7)

The trainman stationed in the aisle of coach 3411 testified that the impact of the initial collision threw respondent and another passenger from their feet. (R. 44) Approximately six seconds later, alarmed by the smell of gasoline and the noise of the car scraping against the coach the trainman pulled the emergency cord which cut off power from the engine and set the brakes. (R. 49) The application of the emergency cord was to prevent a derailment of the train (R. 79). This trainman and all occurrence witnesses stated that there was no jerk from the pulling of the emergency cord, (R. 46, 58, 60, 73, 83) but the impact of the collision resulted in a jar to the train. (R. 57, 71, 77) At the time of the collision the train was going between 70 and 75 miles per hour. (R. 81) Emergency brakes stopped the train within

three-quarters of a mile. (R. 46) Regular utility brakes would have required more than a mile to stop the train. (R. 49) The braking power was controlled by "reducers." (R. 53)

Respondent's counsel tried the case below on the alleged negligence of the brakeman in pulling the emergency cord.

II.

Jurisdictional statement.

The jurisdiction of this court is invoked under section 240(a) of the Judicial Code (28 U.S.C. Sec. 347(a)). Decision was rendered by the circuit court of appeals on May 24, 1948. (R. 165) After the decision of the circuit court of appeals, in apt time petitioner sought rehearing, which was denied by order of June 14, 1948. (R. 166)

This case is reported in 168 F. 2d 496.

III.

The question presented.

Did the Circuit Court of Appeals, Seventh Circuit, err in applying the Wisconsin law applicable to the facts when it concluded there was evidence in the record to support the jury's verdict?

IV.

Reasons for the allowance of the writ.

Contrary to the local law applicable, that of Wisconsin, the circuit court of appeals erroneously concluded that uncontradicted evidence of a non-negligent cause of respondent's injuries was insufficient to rebut an inference of negligence arising from the doctrine of *res*

ipsa loquitur. The effect of the court's decision is to make petitioner an absolute insurer of the safety of its passengers, establishing a rule of liability for common carriers which does not exist under the Wisconsin law and which the Wisconsin courts would not apply.

Contrary to *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, the circuit court of appeals in so deciding failed to follow the Rules of Decision Act (Act of September 24, 1789, revised statutes sec. 721, 28 U.S.C.A. sec. 725) and determined an important question of local law in conflict with the applicable local law.

In the interest of justice this court should grant certiorari because (a) the Circuit Court of Appeals for the Seventh Circuit has sanctioned a departure by a lower court from the accepted and usual course of judicial proceedings so as to call for an exercise of this court's power of supervision, and (b) it is necessary that the judgment of the circuit court of appeals may be reversed to conform to the Wisconsin law.

V.

Prayer.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of the Supreme Court commanding the United States Circuit Court of Appeals for the Seventh Circuit to certify and send to this court for its review and determination, on a day certain named therein, a complete transcript of the record in the case numbered and entitled on its docket as 9388, Betty Matsumoto, plaintiff-appellee, v. Chicago and North Western Railway Company, defend-

ant-appellant; that the judgment of the circuit court of appeals be reversed by this court and that the petitioner may have such other and further relief as seems just.

Respectfully submitted,

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

By LOWELL HASTINGS,
WARREN NEWCOMB,
attorneys for petitioner

DRENNAN J. SLATER,
JOHN L. DAVIDSON, JR.,
of counsel.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

I.

Specification of Error to be Urged.

The circuit court of appeals erred in affirming the judgment of the district court. Under Wisconsin law there was no evidence upon which the case should have been submitted to the jury and it was the clear duty of the circuit court of appeals to reverse the judgment of the trial court and to enter judgment for the defendant.

II.

ARGUMENT.

A.

Under Wisconsin law the facts in this case do not support a verdict based upon res ipsa loquitur and the judgment must be reversed.

Admitted by counsel for respondent at all stages in this case and conceded by the circuit court of appeals is that there is no direct evidence of negligence and the judgment rests upon the doctrine of *res ipsa loquitur*.

In Wisconsin as elsewhere the classic formula for establishing *res ipsa loquitur* as set forth by this court in *San Juan Light Co.* v. *Requena*, 224 U. S. 89, 98 applies.

As is generally the rule, in Wisconsin, the doctrine merely establishes an inference which when rebutted dissolves, leaving no issue for the jury. As elsewhere, too, when there are two possible causes of injury, one negligent, as supported by inference arising from the *res ipsa loquitur* doctrine, or the other non-negligent, supported by evidence, there is likewise no issue for the jury.

Judge Duffy, who has had a long and distinguished career at the bar of Wisconsin and on the bench in that state, dissented. He stated (R. 163):

> "The Wisconsin Supreme Court has stated that the doctrine of *res ipsa loquitur* creates a rebuttable presumption capable of being rebutted so as to leave no issue for the consideration of the jury. *Klitzke* v. *Webb*, 120 Wis. 254; *Lillis* v. *Beaver Dam Woolen*

Mills, 142 Wis. 128; *Dehmel* v. *Smith*, 200 Wis. 292. A distinction is also drawn where the accident is caused in whole or in part by an outside agency.

"In *Smith* v. *Chicago, North Shore and Milwaukee Railroad Company*, 180 Wis. 259, a case where the plaintiff was a passenger upon defendant's train, the court said (p. 267):

'• • • The accident was caused by an outside agency over which the defendant and its agents had no control. Under the facts proven, if there was any presumption of negligence it was fully rebutted • • • .'"

The reasoning of the supreme court of Wisconsin in *Sommerfeld* v. *Chgo. N. S. & M. R. R.*, 173 Wis. 191, 180 N. W. 847, also referred to in Judge Duffy's dissent (R. 163), is precisely in point in the case at bar. In the *Sommerfeld* case, plaintiff, a passenger on defendant's train, was injured when a window suddenly broke. It was shown that such a break could have been caused by an imperfection in the glass or it could have been caused by some missile. Judgment on the verdict for plaintiff was reversed, the supreme court holding that the verdict was not supported with any reasonable certainty and was reached solely through speculation. On the doctrine of *res ipsa loquitur*, the court said at page 195:

> "Some unknown cause may have produced the break in the glass which was wholly unrelated to defendant's duty to furnish a proper glass and place it in a reasonably sufficient sash in an ordinarily careful manner. *It is considered that under the facts and circumstances shown the doctrine of res ipsa loquitur does not apply to this case.*" (Emphasis supplied.)

In *Rost* v. *Roberts*, 180 Wis. 207, 192 N. W. 38, a case cited in the majority opinion below (R. 158), the Wisconsin court said, at page 211:

> "*Res Ipsa Loquitur* is a doctrine which permits an inference of negligence from the mere proof of an injury or accident *where it appears that the injury or accident would not or could not have happened except for the negligent conduct of a defendant.*" (Emphasis supplied.)

In the *Rost* case plaintiff sued a doctor for injuries received from X-ray treatments. While the doctrine of *res ipsa loquitur* was held applicable, a directed verdict for defendant was affirmed because the evidence indicated there was as much reason to believe that plaintiff's burns resulted from his peculiar susceptibility to X-rays as to negligent treatment.

In *Dahl* v. *Krause Milling Company*, 234 Wis. 231, 289 N. W. 626, plaintiff's injuries resulted from an explosion in defendant's factory. Plaintiff proceeded on the theory of *res ipsa loquitur*. The trial court dismissed the case and was affirmed by the supreme court of Wisconsin, which held that the possibility of non-negligent causes of the explosion were so great and the evidence so lacking to eliminate them that the court was forced to conclude that no liability was originally inferable. In reaching its decision in the *Krause* case the court cited with approval the following quotation from *Hyer* v. *City of Janesville*, 101 Wis. 371, 377, 77 N. W. 729, 731:

> "• • • where there is no direct evidence of how an accident occurred, and the circumstances are as clearly as consistent with the theory that it may be ascribed to a cause not actionable, it is not within the proper province of a jury to guess where the truth lies and make that the foundation for a verdict."

The uncontradicted facts set forth in the petition herein clearly will not support the verdict upon which respondent's judgment rests. Under Wisconsin law no issue was established for submission to the jury.

It is uncontradicted that there was but one jar to the train and that jar was produced by the collision which was admittedly not caused by any negligence of petitioner. The only action complained of, that of the brakeman, took place after the jar to the train and after respondent was injured. Nevertheless, the majority opinion states: (R. 157)

> "It is apparent from the foregoing, and both parties recognized it in the trial court, that the alleged negligence of defendant was solely the result of what the brakeman did or did not do when he pulled the emergency cord."

Such a statement is clearly erroneous for the brakeman's action had nothing to do with the case. Petitioner did not admit that such action had any bearing on its alleged negligence.

Even conceding that the brakeman's action was negligent (which petitioner does not), at its most favorable aspect respondent's case rests on an inference of negligence from the act of the brakeman, which inference is opposed by the uncontradicted evidence of a non-negligent cause. Under the Wisconsin law set forth herein, the judgment should not stand. There is no evidence to eliminate the non-negligent cause of the injuries here.

To reach its decision the circuit court of appeals relied upon two Wisconsin cases, *Dehmel* v. *Smith*, 200 Wis. 292, 227 N. W. 274, and *Koehler* v. *Thiensville State Bank*, 245 Wis. 281, 14 N. W. 2d 15. Each of those cases is clearly distinguishable from the facts in this case.

In *Dehmel* v. *Smith*, plaintiff was in a passenger elevator operated by a servant of defendant. The elevator suddenly fell. Plaintiff testified as to a jolt to establish a *prima facie* case. Defendant's witnesses testified to the inspection of the elevator, one of them testifying the

elevator "if operated properly as, he operated it, worked perfectly". However, the elevator operator was not produced as a witness and no direct testimony as to what he did or what he failed to do that he might have done was given. The court stated at page 296 of the official report:

> "The only testimony to this point is by Kieckhefer that he did not think the operator could very well cause the unusual movement of the car, but this is far short of saying that he could not cause it".

In *Koehler* v. *Thiensville State Bank*, 245 Wis. 281, 14 N. W. 2d 15, plaintiff sustained injuries from the explosion of a tear gas system installed in the bank. There were two methods which would set off the mechanism. Four months prior to the explosion there had been an inspection which showed the system to be in working order. However, six weeks prior to the occurrence the system was accidentally tripped, and defendant's employees upon telephonic instructions from the manufacturer reset the mechanism. In addition, subsequent to the explosion, defects in the system were discovered. The court held that the accident was one which could not have happened except for the negligence of the defendant and that there the defendant, not having eliminated all possibility of negligence and being solely in control of the mechanism, was liable.

In the two cases above the evidence clearly showed that the injury could only have been caused by the negligence of the defendant's agents. There was not even an inference that anything outside the control of the defendants caused the injury. Neither case is applicable to the instant case where there was but one jolt and that caused by a collision with an outside agency, which collision admittedly was without negligence of petitioner.

B.

Under Wisconsin law, petitioner is not an insurer.

The duty of petitioner in Wisconsin to its passengers is set forth by the supreme court of that state in *Ormond* v. *Wisconsin Power & Light Co.*, 194 Wis. 305, 308, 216 N. W. 489:

> "To be true, the care exacted of the common carrier is a high degree of care. To constitute ordinary care it must be the 'highest degree of care reasonably to be expected from human vigilance and foresight.' It is but the application of the doctrine that 'the standard of duty should be according to the consequences that may ensue from carelessness.' *Indianapolis & St. L. R. Co.* v. *Horst*, 93 U. S. 291, at p. 296. *The carrier is not an insurer of the safety of its passengers.*" (Emphasis supplied.)

The rationale of the decision of the circuit court of appeals is that when a passenger is injured, a carrier must disprove every possible negligent cause "to a verity" and that if it fails to do so an issue for the jury is created. Such a concept as has been pointed out is not the Wisconsin doctrine of *res ipsa loquitur*. It cannot be justified on the theory of the carrier being an insurer of its passengers' safety; but nevertheless the court would make a carrier such an insurer.

The Rules of Decision Act as interpreted by this court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, does not permit a federal court to rewrite the common law of a state. The right to change the local law of Wisconsin is still reserved to the people of that state.

Conclusion.

Petitioner respectfully urges that it is the duty of this court to exercise its discretionary supervision of lower federal courts by granting certiorari in this case to the end that in conformity with the law of Wisconsin the judgment be reversed or the cause remanded with directions to enter judgment for petitioner.

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